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IN THE

SUPREME COURT OF THE UNITED STATES

Petition For Writ of Certiorari Based On Jurisdiction Established By 28 U.S. Code Sec. 1257(3) From Decision of the Supreme Court of the State of Kansas, Case No. 44,625, First Published On July 17, 1967 and Finalized On August 31, 1967 By Denial of Motion For Rehearing

THE STATE OF KANSAS
Appellee
vs
ROBERT M. WALKER
Appellant

BRIEF OF APPELLANT

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THE STATE OF KANSAS
Appellee
vs
ROBERT M. WALKER
Appellant

BRIEF OF APPELLANT

NATURE OF THE CASE

In September, 1965, the Defendant was charged in the County Court of Wilson County, Fredonia, Kansas with violation of two (2) sections of the criminal provisions of the General Statutes of the State of Kansas which provide as follows:

Count I, Section 8-235: No person, except those hereinafter expressly exempted, shall drive or operate any motor vehicle upon a highway in this State unless such

person has a valid license as an operator, a special chauffeur, or a chauffeur under the provisions of this act.

Count II, Section 8-530: It is unlawful and punishable as provided in Sub-division (b) of this section for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle within this State.

Subsequent to September, 1965, the County Attorney of Wilson County, Kansas, Mr. Donald C. Vosburgh, withdrew or dismissed the charges filed in the County Court of Wilson County, Kansas without a preliminary hearing being held and without the knowledge of Defendant, and filed charges against the Defendant in the District Court of Wilson County, Kansas.

In the District Court of Wilson County, Kansas, the Defendant, Robert M. Walker, the Appellant herein, was convicted of driving a vehicle on Highway K-96, Wilson County, in the State of Kansas, in violation of three (3) sections of K.S.A. 2-101, which provide as follows:

Count I, Section 8-235: No person, except those hereinafter expressly exempted, shall drive or operate any motor vehicle upon a highway in this State unless such person has a valid license as an operator, a special chauffeur, or a chauffeur under the provisions of this act.

Count II, Section 8-531: Any person who drives any vehicle in such a manner as to indicate either a wilful or wanton disregard for the safety of persons or property is guilty of reckless driving.

Count III, Section 8-530: It is unlawful and punishable as provided in Subdivision (b) of this section for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle within this State.

This case was tried in the District Court of Wilson County, Kansas on the 14th day of February, 1966.

Conviction of Defendant, Robert M. Walker, on the three (3) counts listed above was appealed to the Supreme Court of the State of Kansas.

Under the date of July 17, 1967, the Supreme Court of the State of Kansas reversed the conviction as to Count I and affirmed the conviction as to Counts II and III.

The Abstract of Apellant shows the evidence, instructions, objections and the rulings thereon pertinent to the questions now before this Court. All of these questions were presented to the trial court and the Supreme Court of the State of Kansas by a Motion for a New Trial, a Motion for Rehearing and arguments thereon, which motions were overruled, hence the appeal to this Court.

QUESTIONS RAISED

1. DID THE TRIAL COURT ERR IN REFUSING TO DISCHARGE THE DEFENDANT FROM CHARGES BROUGHT AGAINST THE DEFENDANT UNDER COUNTS II, AND III AT THE CONCLUSION OF PRESENTATION OF EVIDENCE BY THE STATE?

2. DID TRIAL COURT ERR IN REFUSING TO LET THE DEFENDANT TESTIFY AS TO MATERIAL MAT-

TESTS, AND IN ALLOWING TROOPER WILTSE TO GIVE HIS OPINION, AND IN REFUSING TO ALLOW THE DEFENDANT TO GIVE HIS OPINION, EVEN THOUGH A PROPER FOUNDATION HAD BEEN LAID?

3. DID THE COURT ERR IN ADMITTING INTO EVIDENCE STATEMENTS MADE OR ALLEGED TO HAVE BEEN MADE BY DEFENDANT SUBSEQUENT TO ARREST WHEN DEFENDANT HAD REQUESTED AN ATTORNEY AND WHICH STATEMENTS WERE PREJUDICIAL AND INCRIMINATING?

4. DID THE COURT ERR IN ALLOWING TESTIMONY AS TO CONVERSATIONS AND ANSWERS RESULTING FROM CUSTODIAL INTERROGATION AND WITHOUT ADVISING DEFENDANT OF HIS CONSTITUTIONAL RIGHTS AND WHICH TESTIMONY WAS IN CONFLICT WITH THE TESTIMONY OF DEFENDANT?

5. DID THE COURT ERR IN NOT DISCHARGING THE DEFENDANT FROM COUNT II AND IN ALLOWING THIS COUNT TO BE CONSIDERED IN CONJUNCTION WITH COUNT III, REGARDING WHICH THE COURT ALLOWED INADMISSIBLE AND PREJUDICIAL EVIDENCE TO BE SUBMITTED FOR CONSIDERATION BY THE JURY?

6. DID THE COURT ERR IN ADMITTING EVIDENCE RESULTING AFTER THE DEFENDANT HAD REQUESTED THE PRESENCE OF AN INDEPENDENT WITNESS?

7. DID THE TRIAL COURT ERR IN OVERRULING DEFENDANT'S MOTION FOR A NEW TRIAL AND DID THE KANSAS SUPREME COURT ERR IN DENYING DEFENDANT'S MOTION FOR A REHEARING?

STATEMENT OF FACTS

In September, 1965, the Defendant, Robert M. Walker, was charged in the County Court of Wilson, County, Kansas with two (2) violations of the criminal statutes of the State of Kansas, namely: driving without having a valid driver's license and driving while under the influence of alcohol. These charges were dismissed or withdrawn without the knowledge of Defendant and without a hearing being held thereon. The charges were refiled and another charge added, that of reckless driving, in the District Court of Wilson County, Kansas.

The Defendant, Robert M. Walker, was accused in the District Court of driving a motor vehicle on September 4, 1965, on State Highway K-96, in Wilson County, Kansas, in volation of three (3) sections of the K.S.A. 2-101, which provide as follows:

Count I, Section 8-235: No person, except those hereinafter expressly exempted, shall drive or operate any motor vehicle upon a highway in this State unless such person has a valid license as an operator, a special chauffeur, or a chauffeur under the provisions of this Act.

Count II, Section 8-531: Any person who drives any vehicle in such a manner as to indicate either a wilful or wanton disregard for the safety of persons or property is guilty of reckless driving.

Count III, Section 8-530: It is unlawful and punishable as provided in Subdivision (b) of this section for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle within this State.

On September 4, 1965, the Defendant was driving east on Highway K-96, in Wilson County, and his car was stopped by Trooper Wiltse. Trooper Wiltse placed the Defendant under arrest and subsequent thereto, while at the scene, he had conversation with the Defendant. Trooper Wiltse searched the automobile; he slammed the Defendant against the front of the Highway Patrol car; he allowed the Defendant's wife to drive the Defendant's car into Fredonia; he drove Defendant into Fredonia in the Highway Patrol car; he interrogated the Defendant on the way into Fredonia without advising the Defendant of his constitutional rights; he took the Defendant inside the county jail at Fredonia. The Defendant on the way into the jail at Fredonia asked his wife to get an attorney but to stay in the vicinity as he was going to need a witness. Trooper Wiltse slammed the Defendant's wife against a brick parapet and threatened to arrest her if she didn't leave the vicinity. Trooper Wiltse slugged the Defendant while inside the jail, even though admittedly no threatening gestures or threats were made against him. Trooper Wiltse interrogated the Defendant inside the jail and asked him to take some coordination tests; the Defendant replied either "no comment" or "not applicable" to questions and reiterated several times that he was willing to take any sobriety

test if an independent witness was allowed to be present. Trooper Wiltse refused to allow the presence of an independent witness and the Defendant was then put in a jail cell.

ARGUMENT AND AUTHORITIES

1. Did the Court err in refusing to discharge the Defendant from charges brought against the Defendant under Counts II and III at the conclusion of presentation of evidence by the State?

The basis of argument upon Count II, which charged the Defendant of reckless driving, is as follows:

The only evidence submitted in regard to reckless driving was that Trooper Wiltse testified that Defendant's left wheels crossed the center line on an incline; that the terrain was rolling and hilly; that the place where the Defendant's left wheels crossed the center line was half-way up the incline and that Defendant's left wheels crossed the center line four or five times within a mile. At *AM JUR* 420, Failure to Prove Essential Element, it is stated as follows:

> "Where the evidence fails to establish or shows the absence of an element necessary to justify a conviction, a motion to direct a verdict of acquittal on that ground must not be denied." *State v. Sullivan,* 199 P. 647.

In *Elliott v. Peters,* 163 Kan 636, in regard to reckless driving, under statute 8-531 it is stated:

> "To constitute wantonness, the acts complained of must show not simply lack of due care, but that the actor must be deemed to have realized the imminence of injury to others from his acts and to have refrained from taking steps to prevent the injury because indifferent to whether it occurred or not. If the actor has

reason to believe his act may injure another and does it being indifferent to whether it does or not, he is guilty of wanton conduct."

In *Adubbel vs. Brighton,* 141 Kan 617, the Court stated:

"We see from these authorities that this court has consistently held that for the conduct of the defendant to constitute a basis for a cause of action under the statute (G.S. 8-122b) it must show a reckless disregard of consequences as to evince a willingness that some harmful result will flow therefrom."

In *Anderson vs. Anderson,* 142 Kan 466, the Court stated:

"Our task is to ascertain what was in the mind of the driver. Wanton negligence requires as an element a mental attitude on the part of the Defendant of a will to injure, or such indifference to consequences, with realization that catastrophe is imminent as to amount to willingness to injure. This distinguishes such conduct from negligence, which is merely failure to exercise due care."

There was no accident involved in subject case, nor any evidence supporting any probability of an accident. The evidence does not show any imminence of injury to persons or property, nor any evidence to support the proposition that Defendant believed or had cause to believe his act might cause injury. There is no showing evidencing a reckless disregard of consequences.

In summation, giving all of the evidence the inferences in favor of the State, there is no evidence establishing the elements of the crime of reckless driving which would justify submission of the case to jury or a conviction by the jury after its submission.

Therefore, the demurrer to the evidence should have been sustained and the Defendant discharged and it was error for the Court to fail to discharge the Defendant, unless there was evidence supporting a wilful disregard of consequences other than the facts pertaining to driving.

With further regard to Count II in which the defendant was charged with driving "in such a manner as to indicate a wilful and wanton disregard for the safety of persons or property" in violation of K.S.A. 8-531, the only evidence of the manner of driving itself was that several times in going up a hill the vehicle of the defendant crossed the center line of the highway, on one occasion in a no-passing zone. The terrain was hilly, the speed limit in that area is 45 M.P.H. The defendant was within the speed limit.

It is the position that this, without more, does not constitute reckless driving, and in and of itself does not come within the statutory definition of indicating a wilful or wanton disregard for the safety of either persons or property.

Granting, as is argued by the State, that there need be no accident or injury to constitute reckless driving, still it must be agreed that reckless is a relative matter. Therefore, it would seem reasonable to require that there be a showing that the manner of driving was such that there was a clear danger of losing control of the vehicle, or that in complete control, which is a presumption, that there was in fact, danger to someone or something. It is submitted that the left hand wheels crossing to the left of the center line, even on the upgrade of a hill, and where the highway

is marked, shows neither. In this connection it should be remembered that the cars behind the vehicle were in no position to pass the defendant, both because of the speed limit and because of the hill and no-passing zone, and that there were no automobiles approaching from the opposite direction.

This is, of course, a violation of K.S.A. 8-537, but this violation, without more, is not recklessness. Analogous to this are the situations in which it has been claimed that the violation of a 'Rule of the Road' constitutes actionable negligence. This Court has held that this does not necessarily follow. In *Gardner v. Leighton* 144 K. 335, 58 P. 2d 1111, Justice Dawson wrote at page 338: "Defendants emphasize the fact that plaintiff's automobile was traveling on the south side of the road. True, but the used portion of the road was only about 12 feet wide in that vicinity. Moreover, when a motorist, so far as he can see, has the entire road to himself, he may travel on any portion of it, in the middle or on either side." The above decision was rendered in 1936, and the following year the Legislature enacted what is now K.S.A. 8-537, limiting driving to the right side of the highway, excepting under certain conditions and for certain purposes. Subsequently, the case law indicates that if such driving on the left side of the highway is the proximate cause of an accident, then it does constitute actionable negligence. However, in *Beecher v. Stepanian* 170 K. 201, 224 P. 2d 1017, at page 205 it is said "We recognize that not every violation of a statute convicts the actor of actionable negligence."

Thus we see that a violation of K.S.A. 8-537 cannot constitute a violation of 8-531 K.S.A. unless other elements are present. In this case the State took the position and this Court evidently subscribed to the position that the additional element was the fact that the defendant-appellant was under the influence of intoxicating liquor. This is indicated by the Court's statement on page 5 of its original opinion to the effect that:

> "Moreover, Wiltse's testimony that the defendant's automobile crossed the center line four or five times and went up a hill in a "no passing" zone on the wrong side of the highway for about 75 yards where the terrain was hilly and the traffic was heavy, and the defendant was under the influence of intoxicating liquor *(State v. Sullivan,* supra; *State v. Sisneros,* 42 N.M. 500, 82 P. 2d 274; 7 Am Jur. 2d, Automobiles and Highway Traffic, Section 264, p. 816), tended to disclose the defendant's conduct was such as to evince disregard or indifference to consequences, and was sufficient for the jury to reasonably draw an inference of guilt."

The key then must be that the Appellant was under the influence of intoxicating liquor. So it is inescapable that if the trial court erred in regard to evidence supporting the charge of being under the influence of alcohol, then the conviction of reckless driving should also be reversed.

2. Did the Court err by refusing to allow the Defendant to testify as to material matters and in allowing the prosecution to give opinion evidence while refusing to allow the defendant to do so even though a proper foundation had been laid?

The basis of argument on this point is that Defendant was asked on direct examination what happened and in describing what happened he stated that Trooper Wiltse told Defendant he would remain confined in jail until Monday morning and chortled with glee. At this point the Court admonished the Defendant in severe tones and directed the Defendant to answer only questions asked, and directed that Defendant's answer be stricken from the record and the jury was admonished to disregard Defendant's answer. Also, the Court refused to allow the Defendant to testify as to apparent misconceptions about an accident when in truth and in fact there had been no accident. Also, the Court erred in admitting opinion evidence by Trooper Wiltse, even though Trooper Wiltse suppressed evidence by refusing to allow the presence of an independent witness concerning Defendant's intoxication.

3. Did the Court err in admitting into evidence statements made or alleged to have been made by Defendant subsequent to arrest when Defendant had requested an attorney and which statements were prejudical and incriminating.

In Escobido vs. State of Illinois, 378 U.S. 490, 491, 84 S. Court 1765, decided on June 22, 1964, The Supreme Court of the United States held:

> "that where the investigation is no longer a general inquiry into unsolved crime but has begun to focus upon a particular suspect, the suspect has been taken into police custody, the police carry out process of interrogations that lends itself to incriminating statements, suspect has requested and been denied oppor-

tunity to consult with his lawyer, and police have not warned him of his absolute constitutional right to remain silent, the accused has been denied assistance of counsel in violation of the sixth amendment as made obligatory upon the state by the Fourteenth Amendment, and no statement elicited by police during interrogation may be used against him at the criminal trial."

The statements complained of are those resulting from testimony of Trooper Wiltse who testified as follows:

1. That after he had stopped Defendant's car the Defendant asked in very belligerent tones "What do you want?"
2. That Defendant asked Trooper Wiltse whether he had a search warrant when he went to search the car.
3. That on the way into Fredonia he asked Defendant several times what his name was and that Defendant replied "well, just say it's John Doe."
4. That on the way into Fredonia he asked the Defendant to take a blood alcohol test, and the Defendant refused to take the test.
5. That he advised the Defendant he was going to ask him some questions and that they would be used in court against the defendant.
6. That while in the jail he again asked the Defendant his name and received the reply "John Doe."
7. That after he forcibly sat the Defendant down the Defendant replied his name was Robert M. Walker.
8. That Defendant refused to answer any other questions he asked.
9. That while in the jail he again asked the Defen-

dant to take a blood alcohol test, and the Defendant refused again to take a blood test.

10. On cross-examination he volunteered the information that he asked Defendant on the way in to the county jail to take a blood test, and he further testified the Defendant refused to take a blood test.
11. On cross-examination he stated he asked the Defendant a second time to take a blood test and the Defendant refused.
12. That at the County Jail he asked the Defendant if he was operating the vehicle, where the Defendant was going, and whether Defendant had been drinking and that Defendant refused to answer these questions.
13. That at the jail he asked the Defendant what the Defendant had been drinking, what time did Defendant start drinking, when did the Defendant stop drinking and where was the Defendant drinking, and in response to these questions the Defendant replied "not applicable."

Other testimony as to conversations and interrogations was given by Sheriff Hubert Harris. He testified that Trooper Wiltse advised Defendant he was going to ask Defendant some questions which would be used against him, that Defendant refused to answer the questions and that Defendant was uncooperative.

Trooper Wiltse, testifying for the prosecution stated he had not advised the Defendant of his rights, nor was there any showing Defendant had been advised of his constitutional rights, and that Defendant had requested an attorney.

The interrogation of Defendant by Trooper Wiltse was never a general inquiry, and admission of the alleged statements made by Defendant as set forth above constitutes reversible error in accordance with principles and standards established by *Escobido vs. State of Illinois.*

4. Did the Court err in allowing the prosecution to present testimony regarding conversations and answers resulting from custodial interrogation and without advising Defendant of his constitutional rights, and which testimony was in conflict with and denied by testimony of Defendant.

The conversations and answers complained of are the same as those set forth in Paragraph 3 next above.

In regard to the case of *Miranda vs. Arizona,* 384 U.S. 436, decided by the Supreme Court of the United States, it is set forth at 10 A.L.R. 3d 974 as follows:

Evidence § — Statements made at custodial interrogation—admissibility:

1. The prosecution may not use statements, whether exculpatory or inculpatory stemming from custodial interrogation of the Defendant unless it demonstrates the use of procedural safeguards effective to secure the privileges against self-incrimination; "custodial interrogation" is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way.

Criminal Law § 111; Witnesses § 83.5 — rights of accused — warning by police.

2. As a constitutional prerequisite to *any questioning,*

an individual held for interrogation by a law enforcement officer must be warned in clear and unequivocable terms, that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

Criminal Law § 111 — Police interrogation — Right to counsel.

4. If an individual held for interrogation by a law enforcement officer indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no interrogation.

Criminal Law § 111 — Right to counsel — Necessity of warning accused.

30. The absolute requirement of informing a person held for interrogation by a law enforcement officer of his right to consult with a lawyer and the right to have the lawyer with him during interrogation cannot be met by any amount of circumstantial evidence that he may have been aware of this right.

Criminal Law § 1; Witnesses 83.5 — Time when privilege against self-incrimination attaches.

46. The American adversary system of criminal proceedings distinguishes itself at the outset from the inquisitorial system recognized in some countries, commences when an individual is subject to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way; at this point the safe-

guards erected about the privilege against self-incrimination come into play.

Witnesses § 83.5 — Self incrimination — police interrogation.

5. If an individual held for interrogation by police indicates in any manner at any time, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.

It is recognized that in *Johnson vs. State of N.J.*, 86 S. Court, 1772, 1778, 384 U.S. 727, the general principle is set forth that the standards and principles established by *Miranda vs. Arizona* would not apply to cases tried before the decision date. However, this principle was made subject to certain reservations. It was stated in that opinion at page 1778 as follows:

> "In each instance we concluded that retroactive application was justified because the rule affected 'the very integrity of the fact finding process' and averted 'the clear danger of convicting the innocent' *Linkletter vs. Walker*, 381 U.S. 639, and *Tehan vs. United States*, et al Shott, 382 U. S. at 46 — — — — Accordingly as Linkletter and Tehan suggest, we must determine retroactivity in each case by looking to the peculiar traits of the specific rule in question."

The Court did not preclude past defendants as it stated at Page 1780 in regard to "new standards governing in-custody interrogation past defendants may still avail themselves of the voluntariness test."

In other words the court enunciated the principle that retro-

activity probably would not be applied when there was no question as to the truth or falsity of the state's evidence, but would be applied when the truth was a matter at issue.

In addition to the conflict in testimony at the trial, the Defendant stated at the conclusion of the trial to the trial court that Trooper Wiltse, testifying for the prosecution, had committed perjury in numerous instances and that Defendant was willing without reservation to take a polygraph (lie detector) test and for Trooper Wiltse to be given a polygraph test as to their testimony and that the results thereof be admitted into evidence and that if these tests were made, Defendant would waive all rights to appeal. The trial court refused to order these tests, which could have been used only against the Defendant.

The Defendant did not know until the time of the trial of the case what Trooper Wiltse would testify to, as no preliminary hearing was held.

An Affidavit of Perjury was filed with the State of Kansas and another has been filed with the Clerk of the District Court, Wilson County, Kansas, which states as follows:

AFFIDAVIT OF PERJURY

STATE OF KANSAS }
SEDGWICK COUNTY } ss:

ROBERT M. WALKER, Defendant in the above captioned matter, being first duly sworn, deposes and states:

That on February 14th and 15th, 1966, Trooper

Walter Wiltse of the Kansas Highway Patrol, appearing as a witness for the plaintiff in the captioned matter testified falsely and feloniously and particularly as follows:

1. That on September 4, 1965, he saw vehicle driven by defendant cross the center line several times, and on one particular occasion the vehicle crossed the center line on an incline or a hill. (Page 6 of Transcript).

2. That when he put the red light on, the woman in the car dumped the contents of a glass out of the window. (Page 7 of Transcript).

3. That when the defendant got out of his vehicle he stated in a very belligerent tone "What do you want?" (Page 7 of Transcript).

4. That defendant in response to a question asked on the way in to Fredonia, Kansas, refused to take an alcoholic chemical test. (Page 10 of Transcript.)

5. That defendant again refused to take a chemical test in response to request made in the presence of Sheriff Harris. (Page 10 of Transcript).

6. That vehicle driven by the defendant was weaving on the road. (Page 16 of Transcript).

7. That defendant drove up the hill on the wrong side of the road. (Page 17 of Transcript).

8. That he saw defendant drive over onto the left side of the road on numerous occasions, probably four or five times. (Page 17 of Transcript).

9. That defendant was driving on both sides of the road. (Page 24 of Transcript.)

10. That defendant did not ask him what was the matter and that defendant asked what the Trooper wanted. (Page 28 of Transcript).

11. That defendant was weaving on the road, crossing the center line numerous times, and that when defendant got out of the car he had a belligerent attitude. (Page 31 of Transcript).

12. That defendant indicated a belligerent attitude by his first words uttered, which were "What do you want?" (Page 36 of Transcript).

13. That he did not slam defendant against the front of the Highway Patrol vehicle. (Page 36 of Transcript).

14. That Mrs. Walker did not tell him defendant's name. (Page 38 of Transcript).

15. That defendant, in response to a request to take a blood test, stated: "No, I won't take a blood test." (Page 39 of Transcript).

16. That defendant did not, at the time of the foregoing request, make any reference to a doctor. (Page 39 of Transcript).

17. That he asked the defendant a second time to take a blood test in the County Jail. (Page 40 of Transcript).

18. That defendant refused again to take a blood test. (Page 40 of Transcript).

19. That defendant positively did not advise the Trooper he, the defendant, would take a blood test if defendant could have his own physician present. (Page 40 of Transcript).

20. That he told Mrs. Walker he was going to arrest her for interfering with a police officer. (Page 47 of Transcript).

21. That he smelled the glass he saw Mrs. Walker dump the contents from, and it had an alcoholic odor. (Page 99 of Transcript).

In regard to the foregoing, the truth of the matter is as follows:

1. That defendant's car did not cross the center line several times and defendant's car did not cross the center line on an incline of a hill.

2. That Mrs. Walker did not dump the contents of a glass out of the window.

3. That defendant did not state to Trooper Wiltse in a belligerent tone "What do you want" and that defendant did inquire "What is the matter, Officer, was I speeding?"

4. That on the way in to Fredonia, defendant did not refuse to take a blood alcohol test, but defendant did advise that he would be glad to take a test if his doctor was present. That Trooper Wiltse asked defendant the name and address of his doctor and defendant replied Dr. C. T. Hagan, Wichita, Kansas. That Trooper Wiltse stated he was not going to wait for any damn doctor to come from Wichita.

5. That defendant did not refuse a second time to take a B.A.T. in the presence of Sheriff Harris.

6. That defendant's car was not weaving on the road.

7. That defendant did not drive his car up a hill on the wrong side of the road.

8. That defendant did not drive over onto the left-hand side of the road several times, and did not so drive on four or five occasions.

9. That defendant was not driving on both sides of the road.

10. That defendant did ask Trooper Wiltse what was the matter and did not state "What do you want?"

11. That defendant was not weaving on the road and crossing the center line numerous times and defendant did not have a belligerent attitude when defendant got out of his car.

12. That defendant did not indicate a belligerent attitude by his first words and his first words were not "What do you want?"

13. That Trooper Wiltse did slam defendant up against the front of the Highway Patrol car.

14. That Mrs. Walker did tell Trooper Wiltse defendant's name.

15. That defendant did not state "No, I won't take a blood test."

16. That at the time of the request in No. 15, defendant did make reference to a doctor in that he stated he would be glad to take a test if his doctor was present, and that in response to request from Trooper Wiltse, defendant stated his doctor was Dr. C. T. Hagan.

17. That Trooper Wiltse did not ask defendant a

second time to take a blood alcohol test in the County Jail. That there was not even a second request to take a test.

18. That defendant did not refuse for the second time to take a blood alcohol test.

19. That defendant did advise Trooper Wiltse he would take a blood test if defendant's physician was present.

20. That Trooper Wiltse did not tell Mrs. Walker he was going to arrest her for interfering with a police officer.

21. That Trooper Wiltse did not smell a glass he saw Mrs. Walker dump the contents from, as she did not dump a glass and he did not smell alcohol as no alcoholic beverage had been drunk from any glass in the car.

Further, affiant states that the above acts of perjury were knowingly made by Trooper Wiltse and resulted in defendant's conviction of driving while under the influence of intoxicating liquor and reckless driving.

Further, affiant, knowing full well his constitutional rights, stipulates and agrees to take a lie detector (polygraph) test as to the truth or falsity of the foregoing and stipulates that the foregoing tests may be introduced as evidence in any court of law, whether heretofore tried or any subsequent charges, as valid and admissible evidence.

Also, affiant knowing full well his legal rights, stipulates and agrees to the State of Kansas giving a lie detector (polygraph) test to Trooper Walter Wiltse as to the truth or falsity of allegations set forth herein, and stipulates that the results of said test may be introduced as valid evidence

in any court of law in proceedings, whether heretofore tried or instituted subsequent hereto.

ROBERT M. WALKER
ATTORNEY AT LAW

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 20th day of November, 1967.

HELEN PUFFER
Notary Public

My Commission Expires: April 17, 1971.

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing Affidavit of Perjury was mailed to Mr. Robert C. Londerholm, Attorney General of the State of Kansas, State Office Building, Topeka, Kansas and a copy to Mr. Donald C. Vosburgh, County Attorney, Wilson County, Fredonia, Kansas, on this *20th* day of November, 1967.

Robert M. Walker

The State still refuses to give polygraph tests, a recognized investigative technique, to either the Defendant and/or Trooper Wiltse.

In view of the conflict in testimony and the questionability as to the truth or falsity of the state's case, it is the position of the Defendant that the principles enumerated in Miranda apply to subject case.

It is evident from the abstract of Defendant that the Court erred in all of the precepts set forth above in the

case of Miranda v. Arizona, and as such constitutes reversible error.

5. Did the Court err in allowing Count II to be considered in conjunction with Count III, regarding which the court allowed inadmissible and prejudicial evidence to be submitted for consideration by the jury?

The basis for argument on this point is that the inadmissible and prejudicial evidence set forth in #4 above was without doubt considered by the jury as passing upon Defendant's guilt or innocence on Count II, and was clearly prejudicial to the rights of Defendant.

6. Did the Court err in admitting evidence resulting after Defendant had requested the presence of an independent witness?

The basis for argument on this point is that Trooper Wiltse suppressed any and all evidence which might be favorable to the Defendant by refusing to allow an independent witness to be present. Inasmuch as whether Defendant was under the influence at a point in time, the refusal by Trooper Wiltse to allow an independent witness was a disallowance of one's right to prove their innocence, and subjected the Defendant to police conclusions and opinions.

In summation it is the defendant's position that all opinion evidence should not have been admitted when the Defendant was denied the right to establish his innocence by independent and unbiased witnesses.

7. Did the Court err in overruling Defendant's motion for a new trial?

This question raises no new issues which have not been covered in the foregoing discussion. It is Defendant's clear and unequivocable belief that Defendant should have been discharged on all counts for the reasons set forth heretofore, prior to the motion for a new trial, and for these reasons a motion for a new trial should have been granted.

The Defendant requests that this Court sustain Defendant's motion to discharge as to Counts II and III, either individually or completely, or that this Court reverse the decisions of the trial court which were affirmed by the Supreme Court of The State of Kansas.

Respectfully Submitted,

Robert M. Walker
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Wichita, Kansas
and
John Spriggs
614 Indiana
Washington, D.C.
Attorneys for Appellant

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No. 875

IN THE

SUPREME COURT OF THE UNITED STATES

Petition For Writ of Certiorari Based On Jurisdiction Established By 28 U.S. Code Sec. 1257(3) From Decision of the Supreme Court of the State of Kansas, Case No. 44,625, First Published On July 17, 1967 and Finalized On August 31, 1967 By Denial of Motion For Rehearing

THE STATE OF KANSAS,
APPELLEE

vs.

ROBERT M. WALKER,
APPELLANT

ABSTRACT OF APPELLANT

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THE STATE OF KANSAS,
APPELLEE

vs.

ROBERT M. WALKER,
APPELLANT

ABSTRACT OF APPELLANT

INFORMATION

In September, 1965, the Defendant was charged in the County Court of Wilson County, Fredonia, Kansas with violation of two (2) sections of the criminal provisions of the General Statutes of the State of Kansas which provide as follows:

Count I, Section 8-235: No person, except those hereinafter expressly exempted, shall drive or operate any motor vehicle upon a highway in this State unless such person has a valid license as an operator, a special chauffeur, or a chauffeur under the provisions of this act.

Count II, Section 8-530: It is unlawful and punishable as provided in Sub-division (b) of this section for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle within this State.

Subsequent to September, 1965, the County Attorney of Wilson County, Kansas, Mr. Donald C. Vosburgh, withdrew or dismissed the charges filed in the County Court of Wilson County, Kansas without a preliminary hearing being held and without the knowledge of Defendant, and filed charges against the Defendant in the District Court of Wilson County, Kansas.

In the District Court of Wilson County, Kansas, the Defendant, Robert M. Walker, the Appellant herein, was convicted of driving a vehicle on Highway K-96, Wilson County, in the State of Kansas, in violation of three (3) sections of K. & A. 2-101, which provide as follows:

Count I, Section 8-235: No person, except those hereinafter expressly exempted, shall drive or operate any motor vehicle upon a highway in this State unless such person has a valid license as an operator, a special chauffeur, or a chauffeur under the provisions of this act.

Count II, Section 8-531: Any person who drives any vehicle in such a manner as to indicate either a willful or wanton disregard for the safety of persons or property is guilty of reckless driving.

Count III, Section 8-530: It is unlawful and punishable as provided in Subdivision (b) of this section for any

person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle within this State.

This case was tried in the District Court of Wilson County, Kansas on the 14th day of February, 1966.

Conviction of Defendant, Robert M. Walker, on the three (3) counts listed above was appealed to the Supreme Court of the State of Kansas.

Under date of July 17, 1967, the Supreme Court of the State of Kansas reversed the conviction as to Count I and affirmed the conviction as to Counts II and III.

EVIDENCE

Walter Wiltse, a Kansas Highway Patrol Officer, testified as follows:

That on September 4, 1965, he proceeded east on K-39 east of the intersection of K-96 and K-39 and observed a green vehicle; that he observed the vehicle cross the center line several times (T-6); that on one particular occasion the vehicle crossed the center line on an incline or a hill (T-6); that the terrain was pretty hilly (T-6); that the vehicle was occupied by a man and woman; that the man was driving, (T-6); that he stopped the vehicle and that the driver of the vehicle got out of his vehicle and asked "What do you want" in a very belligerent tone, (T-7); that he advised the driver he was under the influence of alcohol, (T-7); that he asked to see the driver's license of the driver and that the driver told him the license had been left at Fall River, (T-8); that he went

around to the driver's side of the vehicle and stuck his head in to start to search the vehicle for an open container when Mr. Walker grabbed him by the shoulder and inquired whether he had a search warrant; that he then forcibly placed Mr. Walker under arrest, (T-8); that Mrs. Walker was allowed to proceed into Fredonia in Defendant's car; that he took Mr. Walker in with him, (T-8); that on the way in he asked Mr. Walker several times what his name was and Mr. Walker replied: "Well, just say it's John Doe" (T-8); that upon arriving at the County Jail Mr. Walker advised his wife to get him an attorney, (T-8); that he put Mr. Walker inside the Jail; that he advised Mr. Walker he was going to ask him some questions and that they would be used against him in Court, (T-9); that he again asked the Defendant what his name was and received the reply "John Doe" (T-9); that Sheriff Harris came out of his residence at this time and that he advised the Sheriff to keep Mrs. Walker away from the door so he could question the Defendant (T-9); that the Defendant got up two or three times and ran to the door; that he grabbed the Defendant and sat him down (T-9); that the Defendant's shirt was torn; that the Defendant gave his name, Robert M. Walker, and age (T-9); that the Defendant refused to answer any other questions he asked (T-9); that at the County Jail he asked for the second time if the Defendant would take a B.A.T. (Blood Alcohol Test) (T-9); that the Defendant refused to submit to a blood alcohol test (T-10); that he had also previously asked the Defendant on the way in to the Jail to take a blood alcohol test and

the Defendant also refused at that time to take the test. (T-10).

On cross-examination, Trooper Wiltse testified that the Defendant evidenced a belligerent attitude by uttering the words "What do you want" (T-32); that the Defendant was slammed up against the front of the Highway Patrol car (T-37); that he twisted the Defendant's arm up behind his back at the time he placed Defendant under arrest on the highway (T-37); that on the way to Jail he asked the Defendant if he would take a blood test (T-39); that Mr. Walker stated "No, I won't take a blood test" (T-39); that the Defendant refused a second time to take a blood test at the County Jail (T-40); that he was positive the Defendant did not state he would take a blood test if the Defendant's physician was present (T-40); that he asked additional questions of the Defendant when he was in the County Jail (T-40); that the Defendant refused to answer questions as to whether the Defendant was operating the vehicle, where he was going, and whether he had been drinking (T-41); that the Defendant responded "not applicable" to questions as to what he had been drinking, when he started drinking, when he stopped drinking, and where he was drinking (T41 & 42); that anyone who exercises their privilege not to answer questions is being uncooperative (T-42); that Defendant agreed to take any reaction tests, such as walking a line, if an independent witness was present (T-44); that he did not get an independent witness because he was not required to (T-45); that the Defendant did not make any physical threats or